Noesting Pin Ticket Co., Inc. *and* Local 106–S, affiliated with Production, Service and Sales District Council, H.E.R.E., AFL–CIO. Case 2–CA–19336

25 May 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 22 September 1983 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The administrative law judge stated that the Board applies "different procedures for affiliation agreements as compared to merger agreements." This statement is no longer correct when the merger involves union locals. See *F. W. Woolworth Co.*, 268 NLRB 805 (1984).

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in New York, New York, on June 28 and 29, 1983. The complaint herein[1] was issued on January 26, 1983, based on an unfair labor practice charge filed on January 3, 1983, by "Local 106, affiliated with the International Production, Service & Sales Employees Union" (Local 106). The complaint alleges that Respondent has refused to recognize or bargain with Local 106, despite the fact that it has been certified by the Board as the exclusive collective-bargaining representative of certain of its employees.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in the Bronx and Beacon, New York, is engaged in the manufacture and nonretail sale and distribution of paper clips and wire formations. Annually, Respondent, in the course and conduct of this business operation, sells and ships from its Bronx and Beacon, New York facility products, goods, and materials valued in excess of $50,000 directly to firms located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that Local 106–S, Production, Service & Sales District Council, H.E.R.E. (Local 106–S) is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

Local 106 filed a petition to represent certain of Respondent's employees. Pursuant to a Stipulation for Certification Upon Consent Election an election was conducted on April 15, 1982,[2] in a unit consisting of all full-time and regular part-time production and maintenance employees, plant clerical employees, printing employees, drivers, shipping and receiving employees and working foreman employed by Respondent at its Bronx and Beacon facilities, but excluding all office clerical employees, guards and supervisors as defined in the Act. The corrected tally of ballots showed that Local 106 received a majority of the ballots cast. Respondent filed timely objections and in Report on Objections and Recommendations, dated July 29, the Acting Regional Director found no merit to any of Respondent's objections, and no substantial issues of fact raised, and recommended that the objections be overruled in their entirety, and that the Board certify Local 106. In a Decision and Certification of Representative, dated October 22, the Board adopted the Acting Regional Director's findings and recommendations and certified Local 106 as the exclusive collective-bargaining representative of the employees in the above-described unit. On November 4, Respondent filed with the Board a motion for reconsideration. This was denied by the Board by order denying motion for reconsideration, dated December 1.

The issue herein is clearly framed. About November 1, pursuant to an affiliation agreement, Local 106 became Local 106–S. Respondent alleges that, because the Board's procedural safeguards were not followed in this

[1] In addition, on March 21, 1983, the Region issued a consolidated complaint in Cases 2–CA–19335 and 2–CA–19403 involving the same parties. This consolidated complaint alleged that Noesting Pin Ticket Co., Inc. (Respondent) violated Sec. 8(a)(1) and (3) of the Act by certain threats and a refusal to recall to employ one individual. On May 26, 1983, this consolidated complaint and the complaint herein were consolidated by an order further consolidating cases and notice of hearing. At the conclusion of the hearing herein, I granted a motion of the General Counsel to sever Cases 2–CA–19335 and 2–CA–19403 from Case 2–CA–19336. At the request of the Charging Party and the General Counsel, I approved the withdrawal of the charge in Case 2–CA–19403 and the dismissal of the complaint as the employee involved was recalled with backpay. All the parties agreed to an informal settlement agreement in Case 2–CA–19335; the General Counsel recommended its approval and I executed the agreement, approving it.

[2] Unless otherwise stated, all dates herein refer to the year 1982.

affiliation, it no longer is obligated to recognize and bargain with Local 106-S.[3] The issue therefore is simply whether Local 106, and its International union, followed the required procedures in affiliating with a different international union; if it did Respondent's duty to recognize and bargain survives; if the proper procedures were not followed, Respondent was relieved of this duty.

The sole witnesses herein were Robert Rao and Joseph Lovell. Robert Rao, prior to the affiliation, was president of the International Production, Service and Sales Employees' Union (IPSSEU); after the affiliation, he was elected president of the Production, Service and Sales District Council, H.E.R.E. (the District Council), and was involved with the Hotel Employees, Restaurant Employees International Union, AFL-CIO, referred to infra and supra as H.E.R.E., as a vice president and a member of its executive board. Lovell was the secretary-treasurer of Local 106 and is presently the secretary-treasurer of Local 106-S.

On November 1, the Union sent a telegram to Respondent stating, inter alia, that "Local 106 stands ready to negotiate a labor agreement." Having received no response, they sent another telegram on December 6 stating, inter alia, that "Local 106 is ready to start negotiations." Lovell, on December 14, wrote to Respondent (on Local 106 stationery) stating that Local 106 had received no response to its prior two telegrams, and that "Local 106, International Production, Service and Sales Employees Union stands ready to start negotiating." On December 28, Respondent wrote to Local 106 that it would not bargain with the Union at that time because it disagreed with the Board's determination in the representation matter and intended to test the Board's certification through the courts.

Prior to the affiliation, IPSSEU was composed of nine local unions, of which Local 106 was one; after the affiliation was consummated, IPSSEU became the District Council and was composed of the same nine local unions.[4] As stated, supra, Lovell is the secretary-treasurer of Local 106-S as he had been of Local 106; Charles Rao is the president of Local 106-S as he had been of Local 106. The remaining officers of Local 106 were Joe Tenga, vice president, and Sal Loicano, recording secretary. The remaining officers of Local 106-S are Allen Jack, vice president, and Martha Thompson, recording secretary (both of whom are employees of employers under contract with Local 106-S). Local 106 and Local 106-S are (and were) governed by a seven person executive board (of which Lovell and Charles Rao are members) and employ no business agents. The geographical area for both is the tristate area. Prior to the affiliation, Local 106 had collective-bargaining agreements with eight employers; since the affiliation, two of these employers have ceased operating, while the other six still maintain collective-bargaining agreements with Local 106-S. The number of employees represented by Local 106 and Local 106-S has remained about the same—300.

[3] Respondent also intends to test in the courts, the Board's certification and decision overruling its objections, but that case was not consolidated with the case herein.

[4] The "S" was added to the Local 106 name in order to distinguish it from an existing local union of H.E.R.E.

Lovell testified that prior to the Board election among Respondent's employees (on April 15) while he was speaking to some of Respondent's employees in a restaurant across from Respondent's premises, he informed them that "by the time the union got in" they would be members of an AFL-CIO union. After the election, "I told them at that time that we were still working on affiliation and it was looking good." About this time, the Union sent the following notice, dated April 20, to be posted at the shops that it represented:[5]

TO BE POSTED ON BULLETIN BOARD

Dear Member:

A General Membership Meeting will be held at Union Headquarters, 100 Livingston Street, Brooklyn, New York on Saturday, May 8, 1982 at 8:30 a.m. In addition to general business, the agenda will specifically include election of delegates to represent the Union at a Special Convention at which time the question of affiliation with AFL-CIO will be voted on, and the formation of a Production, Service and Sales District Council.

PLEASE BRING YOUR MEMBERSHIP BOOK

DO NOT FAIL TO ATTEND—PLEASE BE PROMPT

This meeting was attended by between 20 and 23 Local 106 members; none of Respondent's employees was present. Lovell testified that Local 106 was entitled to two delegates at the convention. At this May 8 meeting, he informed the members that he and Charles Rao would be delegates to the convention and he asked whether any of the members wished to be delegates; there were no nominations.[6] Lovell informed the members that negotiations were being held between IPSSEU and an AFL-CIO union. "There was talk back and forth between the people present that it was a good idea to be a part of an organization like AFL-CIO." None of those present stated that they were against the affiliation. This portion of the meeting consumed about 15 to 20 minutes; no vote was taken. At the Local 106-S general membership meeting in January 1983, Lovell reported to the membership that the convention delegates approved the agreement of affiliation and that the Union was affiliated with H.E.R.E., which was affiliated with the AFL-CIO, "and everyone there was in favor of it."

The agreement of affiliation provides that on approval of the executive boards of H.E.R.E. and IPSSEU, "HERE will, upon affiliation of IPSSEU, form, charter and affiliate a Productions and Service District Council

[5] Lovell saw the notice posted in three of the shops; he testified that the notice was not mailed to the Local 106 members because whenever they send mail to their members a large percentage of it is returned undelivered. This notice was not sent to Respondent for posting.

[6] This is the only aspect of Lovell's testimony that does not appear to be credible. With the only two delegates already chosen, why would he ask if anyone else wished to be a delegate? In addition, it is not unreasonable to assume that at least one of the employee-members present would have volunteered to spend a few days at the Rye Hilton Hotel, all expenses paid.

and charter the present local unions of IPSSEU as local unions of HERE." The H.E.R.E. charter to the District Council is dated November 1; the H.E.R.E. charter to Local 106-S is likewise dated November 1.

Amoco Production Co., 262 NLRB 1240 (1982), is cited by both the General Counsel and Respondent—by Respondent, as the law of the matter herein and by the General Counsel on the ground that the facts herein are distinguishable. In *Amoco*, NOWU (an independent union) represented certain of Amoco's employees. In 1974, its board of directors unanimously agreed to conduct an election to affiliate with OCAW, an AFL-CIO affiliated union. Notices were posted on various bulletin boards stating the reason for the meeting and that it was open to both members and nonmembers. At the meeting the members were informed that in order to vote on the affiliation they had to be NOWU members. Ballots were then mailed to all the employee-members; the approximately 100 nonmember employees were not sent ballots. The members voted in favor of affiliating with OCAW; the company refused to recognize OCAW as the representative of these employees. After a number of Board cases and court remands, the Board found that affiliation vote was invalid "because nonmembers were not permitted to vote, in violation of fundamental due process standards."

The Board began its analysis by stating that "the Board has consistently held that, while affiliation elections need not meet the standards the Board has enunciated for its own election proceedings, there are certain due process requirements which must be met in order to have a valid affiliation election."[7] The Board then quoted the following language from the dissent in *North Electric Co.*, 165 NLRB 942 at 944 (1967), which language was adopted by the Board in *Jasper Seating Co.*, 231 NLRB 1025 at 1026 (1977):[8]

> If the Board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be compelled to vote, they can, at the very least, be afforded *the opportunity to vote*. It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such election. [Emphasis added.]

The Board, in *Amoco*, continued by stating (262 NLRB at 1241):

> To contend, as do our dissenting colleagues, that a union affiliation vote is an internal union matter into which the Board does not ordinarily intrude is inconsistent with their own position. If, in fact, union affiliations are internal union matters why does the Board even look to see if adequate due process has been achieved? The obvious answer to that question is that once either party raises the question of affiliation, either by an amendment to certification proceeding or, as here, as a defense to an 8(a)(5) charge, it is incumbent upon the Board, before it places its imprimatur on an affiliation election, to assure that that election meets adequate due process standards.

The Board concluded: "We find that, in order to provide adequate due process safeguards in an affiliation election, all unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election."

Initially, it should be noted that the change from Local 106 to Local 106-S and from IPSSEU to the District Council was referred to throughout the hearing (and in the agreement of affiliation) as an affiliation and therefore *Amoco*, supra, would be presumptively applicable.

The General Counsel's argument to distinguish the instant matter from *Amoco* is as follows:

> It is important to note that the decision in *Amoco* only addressed the validity of a members only election used as a means to effectuate an affiliation creating a change in the bargaining representative. The Board's decisions in *Amoco* and like cases do not stand for the proposition that an Employer's bargaining obligation ends because its unit employees did not participate and vote, when the certified representative becomes a chartered local of another International union as a result of an otherwise proper affiliation between its International union and another International union, when such an affiliation does not affect representation at the local level and when the continuity of representation is preserved in the local certified representative.

In support of his position, the General Counsel cites *Texas Plastics*, 263 NLRB 394 (1982). In that matter Local 171 of the Meat Cutters Union was certified as the collective-bargaining representative of certain of the employer's employees and thereafter the parties entered into a collective-bargaining agreement. Prior to the expiration of a subsequent collective-bargaining agreement, a convention was convened at which the Meat Cutters Union delegates and Retail Clerks delegates met to effectuate a merger to form UFCW; the convention approved the merger agreement. Local 171 was permitted to send four delegates to this convention, but its executive committee voted not to do so. Local 171 members were informed of the proposed merger, but did not vote on it. At the re-

[7] The Board here cites *Victor Comptometer Corp.*, 223 NLRB 1169 (1976), where the affiliation agreement was voted on by secret ballot after notices of the meeting were posted throughout the plant. The majority found that "the affiliation election was conducted with sufficient procedural and substantive safeguards to ensure a democratic vote, the results of which accurately reflected the wishes of the employee-members of the Association."

[8] In *Jasper* the Board found no unlawful refusal to bargain because nonmembers were not allowed to participate in the secret-ballot vote on affiliation.

quest of UFCW the Regional Director amended the certification and substituted UFCW for the Meat Cutters; the employer alleged that the Regional Director erred in doing this because UFCW was not a successor to the Meat Cutters and the Local 171 members (as well as the other members) were not permitted to vote on the merger. The Board (without mentioning *Amoco*, decided 3 weeks earlier) affirmed the Regional Director's actions, "as the merger of the two International unions did not affect representation at the lower level." It must be noted that *Texas Plastics* involved a merger rather than an affiliation, and all the cases cited therein likewise involved the merger of unions. In another merger case decided the same day, *Knapp-Sherrill Co.*, 263 NLRB 396 (1982), the Board also affirmed a Regional Director's action in amending a certification on the ground that there was a "continuity of representation."

Admittedly there has been a "continuity of representation" herein: Charles Rao and Lovell were the principal officers of Local 106 and are the principal officers of Local 106-S; the shops with which they maintain collective-bargaining agreements are basically unchanged, and also their total membership. The Local 106-S relationship with the District Council has changed only slightly from that of Local 106 with IPSSEU, in that some per capita dues are now transferred to H.E.R.E.

Three additional recent Board cases should also be noted. In *United Steelworkers of America*, 253 NLRB 961 (1980), *Lord Jim's*, 259 NLRB 1162 (1982), and *Seattle First National Bank*, 265 NLRB 426 (1982), the Board found the affiliation agreements were improper, invalid, or ineffective because the elections did not meet minimal due-process standards; one election was members only, another "made a shambles of democratic procedures," and in the third there was no voting by one group of employees.

It is clear that IPSSEU and Local 106 did not comply with the Board's standards for minimal due-process standards in an affiliation election: There was no formal notice[9] sent to the employees regarding the meeting to be held on the subject of affiliation (in fact, less than 10 percent of the members were present at the meeting) and there was no secret-ballot election taken on the subject; in fact, there was no election among the employees. IPSSEU and Local 106, admittedly, followed a loose method of notifying and obtaining the approval of their members on the subject of the affiliation, while following a more rigorous and formal procedure for the delegates' approval of the affiliation at the convention.

Although clearly not complying with the procedural requirements dictated by *Amoco*, IPSSEU did comply with the procedures set forth in *Texas Plastics*, supra. However, as my reading of the above-cited cases convinces me that the Board dictates different procedures for affiliation agreements as compared to merger agreements (although the effect on the employees appears to be the same), and as this was clearly an affiliation of the labor organizations, I find that Respondent did not violate Section 8(a)(1) and (5) of the Act by its refusal to recognize and bargain with Local 106-S.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 106-S is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any conduct in violation of the Act.

Based on the entire record in this proceeding, I therefore make the following recommended[10]

ORDER

It hereby is ordered that the complaint be, and it hereby is, dismissed in its entirety.

[9] The notification to Respondent's employees was even more deficient comprising two meetings of Lovell with some of Respondent's employees in a restaurant near Respondent's premises where he informed them that the Union was negotiating an affiliation with an AFL-CIO union.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.